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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 UNITED STATES OF AMERICA,
11
12 v.
13 COURTLAND M. GETTEL,
14 Defendant.

CASE NO. 16-CR-01099-WQH
ORDER

HAYES, Judge:

15 The matters before the Court are the third party petitions asserting an interest in
16 forfeited property. (ECF Nos. 22, 24, 25, 26, 28, 29, and 30-1).

17 **I. Background Facts**

18 On May 19, 2016, Defendant Courtland Gettel was charged by Information (ECF
19 No. 1) with conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 and
20 criminal forfeiture. *Id.* at 1. Defendant entered into a Plea Agreement and signed
21 Factual Basis Addendum to the Plea Agreement (ECF Nos. 10, 11). Defendant pled
22 guilty to the Information and agreed to admit conduct outlined in the Factual Basis
23 Addendum in exchange for the agreement of the Government to not bring any further
24 charges that arise out of the facts within the Factual Basis Addendum. *Id.*

25 In August 2013, and continuing through January 2015, within the Southern
26 District of California, the Defendant committed wire fraud conspiracy, in violation of
27 Title 18 United States Code § 1349. (ECF No. 11 at 2). Defendant was the operator
28 and majority shareholder of Conix, Inc. (“Conix”). (ECF No. 11 at 1). Conix bought

1 single-family homes from banks or distressed homeowners, and re-sold the homes for
2 a profit. Conix acquired luxury properties in La Jolla and Del Mar, California. The
3 luxury properties were used as collateral to obtain loans in order to purchase the
4 properties for greater than the worth of the properties. *Id.* Defendant misrepresented
5 the worth of the properties, concealed the true purchase prices, falsified the properties'
6 intended uses, and made other material misrepresentations to the lenders. *Id.*

7 Defendant negotiated with "new lenders to obtain millions of dollars in additional
8 loans secured by the properties, concealing from the new lenders that the properties
9 were encumbered with high-priority claims." *Id.* at 3. Defendant and his conspirators
10 forged signatures and documents, like "Deeds of Full Release." *Id.* The proceeds of
11 the offense were approximately \$33,600,000 (U.S. Dollars). *Id.* at 4.

12 As part of the Defendant's Plea Agreement and Forfeiture Addendum, Defendant
13 agreed to a monetary judgment of \$33,600,000 to be entered against him. (*See* ECF No.
14 10 and 12).

15 On June 7, 2016, this Court accepted the Defendant's guilty plea. (ECF No. 15).

16 On June 21, 2016, the Government, Defendant, and Katheryn Nighswander filed
17 a joint stipulation and agreement regarding the sale of properties 750-760 Country Club
18 Lane, Coronado, California (ECF No. 16). Nighswander is the Defendant's ex-wife.
19 The parties agreed that proceeds of the Defendant's offense were used to purchase the
20 two adjacent properties. *Id.* at 1. Because the properties were currently in escrow from
21 an "arms-length" sale, divesting both Defendant and Nighswander from any further
22 interest in the properties, the proceeds of the sale were to be placed into an account
23 controlled by the United States Marshall Service, Southern District of California. *Id.*
24 at 2. The net proceeds constitute the funds subject to forfeiture.

25 On June 24, 2016, this Court issued an Order for Criminal Forfeiture in the
26 amount of \$33,600,000. (ECF No. 18).

27 Pursuant to Title 21 United States Code § 853(n)(1), the Government published
28 notice online and "notices of forfeiture were sent to potential third parties as the United

1 States became aware of their possible interest in the proceeds of the sale.” (ECF No.
2 40 at 8). From August 2016 through October 2016, eight third parties petitioned the
3 Court to assert an interest over the forfeited properties.

4 On August 23, 2016, Francis John Ragen III (“Ragen”) filed a third party
5 petition, on behalf of himself and Ragen Family Trust, to assert an interest in the
6 forfeited property. (ECF No. 22). Petitioners are victims of Defendant’s fraud scheme.
7 (ECF No. 40 at 9). Defendant defaulted on a \$3,000,000 loan to Ragen. None of
8 Ragen’s losses are directly traceable to the proceeds subject to forfeiture. *Id.* ¶
9 August 24, 2016, 750-760 CCL, LLC/HGG Trust jointly filed a third party petition to
10 assert an interest in the forfeited property. (ECF No. 23). Both entities are operated by
11 the Defendant’s ex-wife, Nighswander. Both entities were in possession of the adjacent
12 home and vacant lot which were sold, giving rise to the \$853,361 in net proceeds. (ECF
13 No. 23 at 4). 750-760 CCL, LLC/HGG Trust’s petition admitted that fraudulently-
14 obtained proceeds from Partner’s Capital loan were used to purchase the adjacent home
15 and vacant lot. *Id.* at 4. Petitioners subsequently withdrew this Petition. (ECF
16 No.117).

17 On August 25, 2016, First American Title Insurance Company (“First
18 American”) filed a third party petition to assert an interest in the proceeds subject to
19 forfeiture. (ECF No. 24). First American was the title insurance carrier for Anchor
20 Loans, Inc. (“Anchor Loans.”). *Id.* at 1. Anchor Loans made a \$4,625,000 loan to the
21 Defendant for property located in La Jolla. *Id.* As Anchor Loan’s title insurance
22 carrier, First American is a victim of Defendant’s fraud scheme. (ECF No. 40 at 9).
23 None of First American’s losses are directly traceable to the proceeds subject to
24 forfeiture. *Id.*

25 On August 30, 2016, Christiana Trust filed a third party petition to assert an
26 interest in the forfeited property. (ECF No. 25). Defendant had pledged a pool of
27 assets in order to obtain loans from Christiana Trust – through JP Morgan. (ECF No.
28 11 at 8-9). The pool of assets included two of the properties located in Calle Del Oro

1 and La Jolla used in the fraud scheme. *Id.* Christiana Trust is a victim of Defendant's
2 fraud scheme. None of the losses are directly traceable to the proceeds subject to
3 forfeiture. (*See* ECF No. 119, 125, and 127).

4 On September 21, 2016, Javlin One, LLC ("Javlin") filed a third party petition
5 to assert an interest in the forfeited property. (ECF No. 26). Javlin made three loans
6 to Defendant for three different properties. (ECF No. 11 at 5-12). Two properties were
7 located in La Jolla and the other was located in Del Mar. *Id.* Javlin is a victim of the
8 of Defendant's fraud scheme. None of Javlin's losses are directly traceable to the
9 proceeds subject to forfeiture. (ECF No. 40 at 12).

10 On September 28, 2016, Keystone National Group ("Keystone") filed a third
11 party petition to assert an interest in the forfeited property. (ECF No. 28). Keystone
12 issued two loans to Defendant, in the amounts of \$4,050,000 and \$238,950 secured by
13 the property at 750 and 760 Country Club Lane. (ECF No. 28 at 1). Keystone's losses
14 are directly traceable to the forfeited funds, but Keystone released the 750 and 760
15 Country Club Lane property as collateral, and allowed 750-760 CCL, LLC to refinance.
16 *Id.* In exchange for releasing the lots as collateral, Keystone was repaid – \$65,679.72
17 still outstanding in the form of a promissory note – and was given a LLC membership
18 pledge agreement. *Id.* Keystone is a victim of Defendant's fraud scheme and a general
19 creditor. Keystone's losses are not directly traceable to the forfeited property. (ECF
20 No. 40 at 11).

21 On September 30, 2016, Stewart Title Guaranty Company ("Stewart Title") filed
22 a third party petition to assert an interest in the forfeited property. (ECF No. 29).
23 Stewart Title was the title insurance carrier for Partner's Capital; CPIF California, LLC
24 ("CPIF"); and LJ 6309, LLC ("LJ"). (ECF No. 29 at 2). Each of the insured lenders
25 loaned Defendant money for different properties and were victims of Defendant's fraud
26 scheme. *Id.* Only Partner's Capital's loan was directly traceable to the proceeds
27 subject to forfeiture. *Id.* at 5. Stewart Title paid Partner's Capital for the defrauded
28 funds. *Id.* Stewart Title is a victim of Defendant's fraud scheme and Stewart Title's

1 losses are directly traceable to the proceeds subject to forfeiture. (ECF No. 40 at 12 and
2 ECF No. 119).

3 On October 13, 2016, R2R Capital-Del Mar Lender, LCC (“R2R”) filed a third
4 party petition (ECF No. 30-1) to assert an interest in the forfeited property. R2R loaned
5 Defendant \$3,000,000 using a property used in Defendant’s fraud scheme, located in
6 Del Mar, as collateral. *Id.* at 2. R2R is a victim of Defendant’s fraud scheme, but the
7 losses are not directly traceable to the proceeds subject to forfeiture. (ECF No. 40 at
8 11).

9 **B. The Proceeds Subject To Forfeiture**

10 In September 2014, Defendant and co-conspirators began negotiations with
11 Partner’s Capital 101, LLC (“Partner’s Capital”) to acquire a \$2,464,000 loan using a
12 property, located at 13594 Mar Scenic Drive, Del Mar, California, as collateral. (ECF
13 No. 11 at 7). During the negotiation and loan execution, Defendant fraudulently
14 concealed two prior active encumbrances upon the property from Partner’s Capital. *Id.*

15 On October 14, 2014, \$2,340,000 of Partner’s Capital’s loan was moved into an
16 account controlled by J.G., a co-conspirator and Defendant’s attorney. Later that day,
17 Defendant used \$1,811,444.17 of Partner Capital money in J.G.’s account to purchase
18 the vacant lot at 750 Country Club Lane, Coronado, California. (ECF No. 40-3 and 40-
19 11 at 2).

20 Defendant began purchasing the lot through an LLC called AIM West, LLC
21 (“AIM West”). (ECF No. 40-11 at 2). AIM West was owned by two other LLCs,
22 which were in turn owned by a fourth LLC controlled by Defendant and a co-
23 conspirator. *Id.* In total, the vacant lot was purchased for \$2,813,907.27. *Id.* To
24 purchase the property, the remaining funds were contributed from the various LLCs in
25 the chain controlling AIM West. *Id.* Before the sale closed, Defendant had AIM West
26 replaced with HGG Trust as the purchaser of the lot. (ECF No. 40-5 at 1). AIM West
27 also released its deposit to HGG Trust as well. *Id.* HGG Trust is “operated by
28 Nighswander, the Grantor; Diane Will (Nighswander’s mother), the Trustee with

1 Defendant and Nighswander's minor son as the beneficiary." (ECF No. 40-11 at 2).
2 On October 15, 2014, HGG Trust became the official buyer of the vacant lot, when
3 "Nighswander signed documents to complete the purchase." *Id.*

4 During December 2014, Defendant through AIM West secured two short term
5 loans (\$4,050,000 and \$238,950) from Keystone National Group ("Keystone") to
6 purchase the adjacent home, located at 760 Country Club Lane. (ECF No. 40-6). The
7 loan was secured by both the home and vacant lot. *Id.* Like the vacant lot, possession
8 of the home was to be transferred. On December 11, 2014, Nighswander and her
9 mother through HGG Trust formed 750-760 Country Club Lane, LLC ("750-760 CCL,
10 LLC") for the sole purpose of possessing and maintaining the properties. *Id.*

11 On or around December 18, 2014, prior to the closing of the sale of the home on
12 760 Country Club Lane, AIM West was again replaced as the purchaser. (ECF No. 40-
13 8). 750-760 CCL, LLC was substituted as the purchaser and AIM West's deposit was
14 released to the transferee. *Id.* The vacant lot held by HGG Trust was also transferred
15 to 750-760 CCL, LLC. (ECF No. 40-7).

16 According to Special Agent John Robert's declaration, on March 6, 2015,
17 "Keystone recorded a Notice of Default." (ECF No. 40-11 at 3). In both May and June
18 of 2015, Keystone requested a payoff of approximately \$4,300,000. *Id.* On or around
19 June 3, 2015, Nighswander attained a new loan of \$4,000,000 from Bank of Internet
20 ("BoFI"), and a subordinate loan from Empac Financial LP ("Empac"). *Id.* After the
21 new loans were secured, Keystone allowed the 750-760 CCL, LLC to refinance its
22 overdue loans. (*See* ECF No. 28).

23 During August, 2015, Keystone and Nighswander worked together to create an
24 acceptable refinancing for both parties. *Id.* As part of the agreement, Keystone
25 accepted the money it was owed, with an outstanding balance of \$65,679.72. *Id.*
26 Keystone agreed to release the properties as collateral, and received a promissory note
27 and a LLC membership pledge. *Id.*

28 On July 8, 2016, 750-760 CCL, LLC sold both properties to "an arms-length

1 purchaser” for approximately \$6,150,000. (ECF No. 40-11 at 4). The net proceeds
2 from the sale were subject to a “deduction of closing and escrow costs, repayment of
3 third party loans on the property, and related fees, costs and expenses to the United
4 States Marshal Service, Southern District of California” and deposited into the seized
5 asset account pending further order of the Court. (ECF No. 16 at 3). The amount of
6 money deposited into the account subject to criminal forfeiture was \$853,361. (ECF
7 No. 40-11 at 4).

8 **II. Applicable Law**

9 Property subject to criminal forfeiture “vests in the United States upon the
10 commission of the act giving rise to forfeiture ... Any property that is subsequently
11 transferred to a person other than the defendant may be the subject of a special verdict
12 of forfeiture and thereafter ordered forfeited to the United States, unless the transferee
13 establishes in a hearing . . . that he is a bona fide purchaser for value. . . .” 21 U.S.C. §
14 853(c); *see United States v. Parcel of Land, Bldgs, Appurtenances & Improvements,*
15 *Known as 92 Buena Vista Ave., Rumson, N.J.*, 507 U.S. 111, 137 (1993) (Scalia, J.,
16 concurring) (explaining the codification of the relation-back doctrine under 21 U.S.C.
17 § 853(c): “[A]t the time the third-party interests are being adjudicated, the relation-back
18 doctrine has already operated to carry back the title of the United States to the time of
19 the act giving rise to the forfeiture, and the third parties have been divested of their
20 property interests . . . Indeed, if the court finds that the transferee has a valid claim
21 under the statute, it must amend the order of forfeiture.” (internal citations and
22 quotations omitted)).

23 Under Title 21, United States Code §853(n), third party petitioners may establish
24 a right to the property subject to forfeiture. Title 21, United States Code § 853(n)(6)
25 provides:

26 If, after the hearing, the court determines that the petitioner has established by
27 a preponderance of the evidence that—

28 (A) the petitioner has a legal right, title, or interest in the property,
and such right, title, or interest renders the order of forfeiture

1 invalid in whole or in part because the right, title, or interest was
2 vested in the petitioner rather than the defendant or was superior
3 to any right, title, or interest of the defendant at the time of the
commission of the acts which gave rise to the forfeiture of the
property under this section; or

4 (B) the petitioner is a bona fide purchaser for value of the right,
5 title, or interest in the property and was at the time of purchase
reasonably without cause to believe that the property was subject
6 to forfeiture under this section;

7 the Court shall amend the order of forfeiture in accordance with its
determination.

8 28 U.S.C. § 853(n)(6)(2009).

9 The disposition of the property is governed by federal forfeiture statutes, but
10 “state law determines what rights, title or interests the various claimants possess in”
11 forfeited property. *United States v. Nava*, 404 F.3d 1119, 1128-1129 (9th Cir. 2005).

12 Under California law, a constructive trust arises by operation of law as soon as
13 “a fraudster acquires property from a victim by fraud.” *United States v. \$4,224,958.57*
14 (“*Boylan*”), 392 F.3d 1002, 1004 (9th Cir. 2004); *citing* Cal. Civ. Code §§ 2223 and
15 2224; *quoting United States v. Pegg*, 782 F.2d 1498, 1500 (9th Cir. 1986) (“One who
16 gains a thing by fraud . . . is . . . an involuntary trustee of the thing gained, for the
17 benefit of the person who would otherwise have had it.”). “The obligation on the
18 fraudster is imposed by law and arises immediately with his acquisition of the proceeds
19 of the fraud.” *Boylan*, 392 F.3d at 1004.

20 California Civil Codes § 2223 states: “One who wrongfully detains a thing is an
21 involuntary trustee thereof, for the benefit of the owner.” Cal. Civ. Code § 2223 (1987).
22 Section 2224 states:

23 One who gains a thing by fraud, accident, mistake, undue influence, the
24 violation of a trust, or other wrongful act, is, unless he or she has some
25 other and better right thereto, an involuntary trustee of the thing gained,
for the benefit of the person who would otherwise have had it.

26 Cal. Civ. Code § 2224 (1987).

27 In *United States v. Wilson*, 659 F.3d 947, 953 (9th Cir. 2011), the Court
28 concluded that petitioner’s constructive trust and the Government interest in the

1 fraudulently attained property vests simultaneously. In *Wilson*, the Court explained
2 that “the Government is merely standing in Wilson’s shoes, and that the Government’s
3 interest cannot exceed” the Defendant’s interest. *Id.* at 954. Upon a petitioner,
4 “original owner,” meeting the burden of proof outlined in § 853(n), the “Government’s
5 interest is eliminated.” *Id.* at 953.¹

6 To prevail using a constructive trust theory, a petitioner typically must show that
7 the forfeited property is directly traceable to the fraud. *See United States v. Benitez*,
8 779 F.2d 135, 140 (2d Cir. 1985) (“It is hornbook law that before a constructive trust
9 may be imposed, a claimant to a wrongdoer’s property must trace his own property into
10 a product in the hands of the wrongdoer.”). Equity can take the place of tracing rules
11 where defrauded parties cannot trace funds from their constructive trust to the property
12 subject to forfeiture. *See Cunningham v. Brown*, 265 U.S. 1, 13 (1924) (equity applied
13 where parties were unable to directly trace co-mingled funds subject to bankruptcy
14 priority rules).

15 Unsecured general creditors lack “a ‘legal right, title, or interest’ in the debtors
16 specific assets, as required under § 853(n)(6)(A).” *United States v. \$20,193.39*, 16
17 F.3d 344, 347 (9th Cir. 1994) (*citing* 21 U.S.C. § 853 (2009)).

18 **III. Ruling of the Court**

19 The record in this case shows that Stewart Title was the title insurance carrier
20 for three victims of the Defendant’s wire fraud scheme and that “that the net proceeds
21 of the sale of the Country Club Lane Property are traceable to” the victims insured by
22 Stewart Title. (ECF No. 29 at 1). Stewart Title asserts and the Government agrees that
23 Stewart Title is the only victim with losses directly traceable to forfeited funds. (ECF
24 No. 40 at 11). The Government asserts that “on equitable grounds” all of the victims
25 of the Defendant’s fraud scheme should be included in an order to distribute the funds
26

27 ¹ The only alternative manner for a petitioner to succeed in an ancillary
28 proceeding is for the petitioner to show that the petitioner was a bona fide purchaser in
accordance with § 853(n)(6)(B). With the withdrawal of the Petition by 750-760 CCL,
LLC/ HGG, this provision plays no role in this resolution.

1 “pro rata.” *Id.* at 13. In the alternative, the Government submits that the money should
2 be given to the only directly traceable victim, Stewart Title. *Id.* at 18. On August 7,
3 2017, the Government submitted additional information asserting that “Stewart Title
4 can trace a total of \$2,094,917 in fraudulently-obtained funds directly to the forfeited
5 funds, and remains the sole known petitioner with directly traceable losses.” (ECF No.
6 119 at 8). Other third party petitioners contend that “the Court should not apply the
7 normal ‘tracing rules’ for claimants regarding funds held in constructive trust.” (ECF
8 No. 67 at 4). Based on equitable grounds, other third party petitioners assert that
9 “victims of a fraud scheme occupy the same legal position whether their proceeds can
10 be directly traced or not.” (ECF No. 76 at 6).

11 The record establishes that Stewart Title was the title insurance carrier for
12 Partners Capital and that Partners Capital loaned Defendant \$2,464,000. The record
13 establishes that a constructive trust was formed around the Partner Capital’s
14 \$2,464,000 loan pursuant to California Civil Code sections 2223 and 2224 at the
15 moment the money was fraudulently taken by Defendant. Upon Stewart Title’s
16 satisfying its obligations to Partners Capital’s title insurance carrier, Stewart Title
17 became the beneficiary of the same constructive trust. The evidence in the record
18 establishes that Defendant used \$1,811,444.17 of the funds held in constructive trust
19 for Stewart Title to purchase the properties in Coronado. The properties were
20 subsequently sold and the net proceeds are directly traceable to losses suffered by
21 Stewart Title. Pursuant to 28 U.S.C. § 853(n), the Court concludes that Stewart Title
22 is entitled to the forfeited funds.

23 The remaining third party petitioners are victims of Defendant’s fraud scheme
24 without losses directly traceable to the forfeited funds. These petitioners do not
25 possess an interest in the forfeited property pursuant to California Civil Code sections
26 2223 and 2224 superior or equal to the interest of Stewart Title. Under the facts of this
27 case, the Court concludes that the normal tracing rules apply.
28

1 **IV. Conclusion**

2 IT IS HEREBY ORDERED the third party petition of Stewart Title Guaranty
3 Company (ECF Nos. 29 and 63) are granted. Stewart Title is entitled to the proceeds
4 from the sale of the Country Club Lane property deposited with the Court. The
5 Government shall prepare the appropriate order.

6 IT IS HEREBY ORDERED the third party petition of Keystone National Group,
7 LLC (ECF No. 28) is denied.

8 IT IS HEREBY ORDERED the third party petition of Francis John Regan III
9 (ECF No. 22) is denied.

10 IT IS HEREBY ORDERED the third party petition of R2R (ECF No. 30-1) is
11 denied.

12 IT IS HEREBY ORDERED the third party petition of First American Title
13 Insurance Company (ECF No. 24) is denied.

14 IT IS HEREBY ORDERED the third party petition of Christiana Trust (ECF No.
15 25) is denied.

16 IT IS HEREBY ORDERED the third party petition of Javlin One LLC (ECF No.
17 26) is denied.

18 DATED: September 7, 2017

19 
20 **WILLIAM Q. HAYES**
United States District Judge